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No. 82-52

In The

Supreme Court of the United States

October Term, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... (ii)

QUESTIONS PRESENTED ..... (iv)

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT

POINT I — THE USE OF SEX-DIFFERENTIATED ACTUARIAL TABLES IN THE COMPUTATION OF BENEFITS, AS DISTINGUISHED FROM THE COMPUTATION OF CONTRIBUTIONS, IS NOT PROHIBITED BY TITLE VII 5

A. Facially Non-Discriminatory 7

B. No "Disparate Treatment" 11

C. No "Disparate Impact" 13

POINT II — TO THE EXTENT TITLE VII PURPORTS TO PRECLUDE A STATE GOVERNMENTAL EMPLOYER FROM PARTICIPATING WITH A THIRD-PARTY INSURER SO AS TO PROVIDE ANNUITY BENEFITS BASED UPON SEX-DIFFERENTIATED ACTUARIAL TABLES, TITLE VII VIOLATES THE TENTH AMENDMENT 15

POINT III — THE MANHART DECISION WAS EXPRESSLY LIMITED TO DISCRIMINATORY CONDUCT BY AN "EMPLOYER" AND AS A MATTER OF LAW THERE WAS NO DISCRIMINATION BY AN "EMPLOYER" 18

POINT IV — EVEN ASSUMING ARGUENDO ARIZONA'S ANNUITY OPTION DID VIOLATE TITLE VII, NEVERTHELESS, THE RELIEF GRANTED BY THE COURTS BELOW WAS CONTRARY TO THE *MANHART* DECISION 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Page

Burns v. Alcala, 420 U.S. 575 (1975) 18

EEOC v. Colby College, 589 F. 2d 1139 (1st Cir. 1978) 23

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 16

Geduldig v. Aiello, 417 U.S. 484 (1974) 8,13

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) reh. den. 429 U.S. 1079 (1977) 8,13

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 3,6,13,14

Hannahs v. New York State Teachers' Retirement System, 26 F. E. P. Cases 527 (S. D. N.Y. 1981) 9

Hishon v. King & Spaulding, 678 F. 2d 1022 (11th Cir. 1982) 18

International Brotherhood of Teamsters, 431 U.S. 324 (1977) 11

Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) ..... passim

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 3,6

National League of Cities v. Usery, 426 U.S. 833 (1976) 3,15,16

Perrin v. United States, 444 U.S. 37 (1979) 18

Peters v. Wayne State University, Nos. 79-165B, 79-1670, 79-1671 (decided October 14, 1982, 6th Cir. 1982) 6,7,8,12,14,23

Smith v. Dutra Trucking Company, 410 F. Supp. 513 (N.D. Cal. 1976) aff'd 580 F.2d 1054 (9th Cir. 1978) 19

Spirides v. Reinhardt, 613 F. 2d 826
(Dist. of Col. Cir. 1979) 19

Texas Department of Community Affairs v. Burdine,
450 U.S. 248 (1981) 11

Constitution

U.S. Const., Tenth Amendment 3, 15, 17

U.S. Const., Fourteenth Amendment, §5 16

U.S. Const., Art. I, §8 16

Statutes

15 U.S.C. §1011 *et seq.* 4

42 U.S.C. §2000e *et seq* 3,18,20,21

New York State Education Law, Art. 11 1,10

QUESTIONS PRESENTED

I. Is the use of sex-differentiated actuarial tables in the computation of retirement benefits, as distinguished from the computation of contributions, prohibited by Title VII (42 U.S.C. §2000e *et seq.*)?

II. Does the Tenth Amendment preclude Title VII from being invoked as a basis to prevent a state governmental employer from participating with a third-party insurer to provide annuity benefits based upon sex-differentiated actuarial tables?

III. Do the elements of a cause of action for discrimination under Title VII require that a defendant be the "employer" of the person claiming discrimination and be guilty of conduct constituting discrimination against such claimant?

IV. Assuming arguendo Arizona's annuity option violated Title VII, did the relief granted by the District Court, as affirmed by the Circuit Court of Appeals, contravene the holding of this Court in *Manhart*?

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BRIEF FOR THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM AS AMICUS CURIAE*

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*This brief is filed with the consent of all parties pursuant to Rule 36 of the Supreme Court.

INTEREST OF AMICUS CURIAE

The New York State Teachers' Retirement System is a public retirement system organized under Article 11 of the Education Law. It has the statutory responsibility to provide retirement benefits for professional employees of more than 800 participating public employers. Its membership consists of school teachers employed by each of the public school districts of the State, certain members of the universities and community colleges which are under the State University of New York and the New York State Education Department. It is one of the largest retirement systems in the country, including both public and private systems, with an active membership of over 190,000 and a retired population in excess of 50,000.

The benefits provided by the New York State Teachers' Retirement System to its retirees include pensions and annuities, both of which are subject to optional modification at the choice of the member. In computing these benefits, the New York State Teachers' Retirement System (hereinafter sometimes referred to as the "System"), for purposes of annuities and any optional modification, employs actuarial tables which are predicated upon the experience amassed by the System during its more than sixty years of operation. These actuarial tables are sex-differentiated, taking into account the sex of the retiree, and in cases of optional modification involving a joint life option, the sex of the retiree's beneficiary. The System's use of sex-differentiated actuarial tables is limited exclusively to the computation of benefits. Contributions made by both employers and employees are unaffected by the sex of any individual member; and, accordingly, are independent of sex.

The New York State Teachers' Retirement System is presently involved in litigation in the United States District Court for the Southern District of New York in cases brought by certain of its retirees and members which challenge the System's use of sex-differentiated actuarial tables. Since the litigation in which the System is engaged, does involve some of the same issues which have been raised in the *Norris* case, the

System is acutely interested in and will be materially affected by the outcome of the *Norris* case.

The System's actuary in an affidavit submitted to the United States District Court for the Southern District of New York in pending litigation has estimated a cost to the System of either $621 million or $689 million, depending on certain assumptions, in the event sex-differentiated actuarial tables are proscribed with full retroactivity and if females are required to have their benefits raised to male levels for purposes of annuities and males are required to have their benefits raised to female levels for purposes of optional modification. Accordingly, the outcome of the issues presented by the *Norris* case will have a very substantial cost, as well as operational impact, upon the System.

SUMMARY OF ARGUMENT

I. The use of sex-differentiated actuarial tables in the computation of annuity benefits, as distinguished from contributions to fund such benefits, is in no way prohibited by the holding of this Court in the case of *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978). Furthermore, the use of sex-differentiated actuarial tables in the computation of annuity benefits is not facially discriminatory and does not result in either "disparate treatment" under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) or a "disparate impact" under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); and, accordingly, the use of sex-differentiated actuarial tables in the computation of annuity benefits is legal and proper under Title VII.

II. A construction of Title VII which purports to extend the holding of *Los Angeles Dept. of Water and Power v. Manhart, supra*, so as to preclude the use of sex-differentiated actuarial tables in the computation of annuity benefits would constitute an unconstitutional invasion of the powers of the states in violation of U.S. Const., Tenth Amendment, as interpreted in the case of *National League of Cities v. Usery*, 426 U.S. 833 (1976).

III. Title VII (42 U.S.C. §2000e *et seq.*) governs relations between employers and their employees, not between employees and third parties. Title VII does not prohibit an employer from providing its employees with the opportunity of availing themselves access to sex-differentiated actuarial tables through an independent third-party insurance company, particularly where such tables are the standard of the industry.

IV. Even assuming arguendo Arizona's annuity option did violate Title VII, although indeed it did not, in any event, the relief granted by the District Court and affirmed by the Circuit Court of Appeals was in direct contravention of the decision of this Court in *Los Angeles Dept. of Water and Power v. Manhart, op. cit.* More specifically, the relief granted to plaintiff Norris by the courts below violated the *Manhart*

decision in that it was retroactively applied to contributions made since the inception of the plan; and, in addition, such relief was granted on a "best table" basis; i.e., plaintiff Norris' annuity was directed to be computed not merely from unisex actuarial tables but rather from male actuarial tables.

V. Although not an issue raised by the parties to this appeal and, therefore, not a matter hereinafter briefed by this Amicus, it is respectfully submitted to this Court for consideration at an appropriate juncture that the application of Title VII so as to preclude a public employer from providing retirement benefits based upon sex-differentiated actuarial tables as part of a state enacted statutory scheme is barred by the McCarren-Ferguson Act (15. U.S.C. §1011, *et seq.*). Amicus notes further that the McCarren-Ferguson issue was not raised in the *Manhart* case.

ARGUMENT

POINT I

THE USE OF SEX-DIFFERENTIATED ACTUARIAL TABLES IN THE COMPUTATION OF RETIREMENT BENEFITS, AS DISTINGUISHED FROM THE COMPUTATION OF CONTRIBUTIONS, IS NOT PROHIBITED BY TITLE VII.

In the case of *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), this Court specifically held:

> "Although we conclude that the Department's practice violated Title VII, we do not suggest the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund."

435 U.S. at 717.

If this Court were to extend the *Manhart* doctrine to proscribe the type of sex-differentiated annuity benefit which is provided by the Arizona Governing Committee ("Arizona") in the case at bar, then, indeed, the insurance and pension industry would be revolutionized. A fundamental actuarial cornerstone relied upon by pension funds for computing not only primary benefits, but also joint life optional benefits, would be destroyed.

The use of sex-differentiated actuarial tables in computing retirement benefits is a prerequisite to the actuarial soundness of pension plans. The mandating of unisex tables would result in widespread proliferation of the practice of adverse selection, which would undermine the fiscal stability of pension plans. For purposes of annuities females would take advantage of their artificially reduced life expectancy, as reflected in unisex tables, while men would opt for a lump sum or fixed term payout of benefits and purchase annuities in the open market where actuarial tables would provide them with a greater payout. As a consequence, unisex tables, reflecting the population mix of the

employer would not realistically reflect the life expectancies of the persons electing benefits pursuant to the tables and, accordingly, would result in an underfunding of the pension fund. On a cumulative basis this would undermine the financial integrity of the pension fund, with the resulting harm falling on innocent third parties.

The *Manhart* decision specifically recognized the need to protect innocent third parties from such harm. Although *Manhart* expressed this concern in the context of retroactivity, the harm would be no less devastating for those individuals who have to bear the consequences of underfunding, regardless of the cause.

In the *Manhart* decision, this Court held that the Los Angeles Dept. of Water and Power plan "on its face, discriminated against every individual woman employed by the Department." 435 U.S. at 716. The Circuit Court of Appeals in the instant case construed *Manhart* as imposing no affirmative burden on a plaintiff in a Title VII action to establish that the defendant acted with discriminatory intent. *Norris*, 671 F.2d 330 at 333. In effect, the Circuit Court in *Norris* held that there were three ways to prove a cause of action for discrimination under Title VII: (a) facial discrimination; (b) "disparate impact" under the theory of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); or (c) "disparate treatment" under the theory of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

In contrast, the 6th Circuit in the recent decision of *Peters v. Wayne State University*, Nos. 79-165B, 79-1670, 79-1671 (decided October 14, 1982), interpreted Title VII, as construed by this Court, as providing only two theories of liability—one

based upon "disparate impact" in cases of a facially neutral plan and the other based upon "disparate treatment" in cases of a facially discriminatory plan. The Court in *Peters v. Wayne State University* stated as follows:

> " 'It is well established under Title VII that claims of employment discrimination...may arise in two different ways.' *Furnco Construction Co. v. Waters*, 438 U.S. 567, 581-588 (1978) (Marshall concurring in part and dissenting in part). The plaintiff must show either 'disparate treatment' or disparate impact. 'The central focus of the inquiry...is always whether the employer is treating 'some people less favorably than others *because of* their...sex.'" *Id.* at 577 (emphasis added) *citing International Brotherhood of Teamsters v. United States*, 413 U.S. 324, 335 n. 15 (1977)."

___ F. 2d at ___.

Amicus respectfully submits that the view expressed in *Peters v. Wayne State University*, rather than *Norris*, constitutes the correct construction of Title VII. However, even assuming arguendo the *Norris* view were to be approved by this Court, in any event, Amicus further submits for the reasons hereinafter set forth that the use of sex-differentiated actuarial tables in the calculation of retirement benefits is not facially discriminatory and does not result in either "disparate impact" or "disparate treatment"; and, accordingly, the use of sex-differentiated actuarial tables in the computation of retirement benefits in no way violates Title VII.

A. FACIALLY NON-DISCRIMINATORY

In the first place, sex-differentiated actuarial tables, when employed in the context of benefit computations, are not discriminatory on their face. Unlike the situation where sex-differentiated actuarial tables are used to compute contributions to a retirement plan, no distinction whatsoever results in the take-home pay of similarly situated males and females. In

the case of *Peters v. Wayne State University et al., supra*, the Court stated:

> "In *Manhart* the employer deducted retirement contributions at different rates from employees' paychecks. Because women were required to contribute more than men, women effectively earned less money than men for the same jobs. Women and men employees at Wayne State contribute the same amount to the retirement plan. *Consequently, they receive equal compensation.*"

___ F. 2d ___ (emphasis added).

Because no differential existed between the contributions and the resulting take-home pay of males and females, the Court in *Peters* concluded the issue of discrimination must be examined in the context of an *employee benefit plan, not employee wages*. The Court in *Peters* predicated its analysis in this regard upon the two landmark benefit cases, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), reh. den. 429 U.S. 1079 (1977), and *Geduldig v. Aiello*, 417 U.S. 484 (1974), quoting Justice Renquist's analysis in *Gilbert* as follows:

> "As in Geduldig, we start from the indisputable baseline that "[t]he fiscal and actuarial benefits of the program... accrue to members of both sexes." 417 U.S., at 497 n 20.
>
> • • •
>
> "The "package" going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' Id., at 496-497....
>
> "As there is *no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme.*"

Peters quoting *Gilbert* at 429 U.S. at 138-139 (citations and footnotes omitted) (emphasis as added in *Peters*).

In contrast to *Manhart* where each woman received a lesser take-home pay than her similarly situated male counterpart as a consequence of sex-differentiated actuarial tables, when sex-differentiated actuarial tables are applied to benefits, a woman may receive either a lesser or a greater periodic retirement benefit than her male counterpart depending upon the form in which she elects her retirement benefit. Although women receive a lesser basic annuity as a consequence of their greater life expectancy, the reduction of that annuity benefit is less than the reduction applicable to a similarly situated male when optional modification in the form of a survivor option is elected. This occurs because the election of a survivor option is in the nature of the purchase of insurance and the cost of such insurance is less for females than males due to their greater longevity; i.e., both the probability that the survivor option will have to be paid out and the period of payment, if any, are reduced by the fact that the female has a greater expected longevity than her male counterpart.[1]

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[1]The fact that sex-differentiated actuarial tables are a double-edged sword which, in the context of options, can either serve to increase or decrease the retirement allowance is exemplified by the circumstances of a woman named "Bessie Hannahs" who has sued the New York State Teachers' Retirement System challenging its usage of sex-differentiated actuarial tables in the computation of benefits. In an affidavit furnished upon the direction of the Hon. Charles S. Haight, Jr., District Court Judge in an interlocutory decision in *Hannahs v. New York State Teachers' Retirement System, et al.*, 26 F.E.P. *Cases 527* (1981), which is pending in the United States District Court for the Southern District of New York, the Actuary for the System stated that Ms. Hannahs' retirement allowance, based upon her election of a 100% joint and survivor option, "would be reduced by $289.80 from $7,334.76 to $7,044.96, if it were recomputed under the unisex tables."

The Actuary further indicated: "If a retroactive revision of benefits is required, then more substantial reductions than those indicated above will be necessary in order to gradually recover the overpayments made in prior years. In Bessie Hannah's case, if NYSTRS had to recoup the overpayments which she has received under sex distinct tables, her annual retirement allowance

When optional modification is taken into account, some female employees enjoy a net gain in benefits when compared to benefits under unisex tables, while some female employees suffer a net loss. Likewise, some male employees enjoy a net gain while others incur a net loss. The resulting gain or loss is a function of the nature of the option, the respective sex of the employee and the beneficiary, and the respective ages of the employee and the beneficiary.[2] In any event, it is clear that sex-differentiated actuarial tables when used for computing retirement benefits are not discriminatory on their face. Unlike *Manhart* every individual woman does not receive a lesser benefit than a similarly situated male when sex-differentiated actuarial tables are applied to the computation of benefits. See *Manhart*, 435 U.S. at 716.

(continued from preceding page)

would be reduced by an additional $136.32, as computed over the balance of her life expectancy under the unisex tables. Her new allowance would be $6,908.64 under the unisex tables, which is $426.12 less than she is currently receiving under NYSTRS' sex distinct tables."

[2] Pursuant to the statutory benefits provided by the New York State Teachers' Retirement System, as mandated by New York State Education Law, Article 11, other factors such as years of service, final average salary, etc. also serve to affect not only the magnitude of a retiree's allowance, but also the magnitude of any increase or decrease occasioned by the election of an option.

B. NO "DISPARATE TREATMENT"

With regard to a Title VII claim founded upon alleged "disparate treatment" this Court has held that the plaintiff must establish that the defendant acted with a discriminatory motive. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 at 336, n. 15 (1977). In the case of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court further held in regard to a claim based upon alleged "disparate treatment":

> "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

450 U.S. at 253.

The *Manhart* decision makes it clear that the tests to be applied in determining liability for discrimination under Title VII in the context of insurance related practices are no different than in other cases. This Court stated in *Manhart:*

> "Finally, there is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage."

435 U.S. 702 at 710.

Based upon the language just quoted from *Manhart*, it is apparent that the requirement of *Burdine* that a plaintiff establish discriminatory intent in order to sustain a claim founded upon "disparate treatment" is applicable to plaintiff Norris. It is equally clear from the record that plaintiff Norris failed to sustain this burden.

The stipulated facts show that the plan is "offered to all state employees on a voluntary basis. There is no employer contribution to the plan." 486 F. Supp. 645, 648. The life annuity option was provided to members along with the choice of a lump-sum option or a fixed monthly payout over a specified period of time. The annuity was provided through separate companies as funding media which included insurance companies. Calculation of the annuity payout was determined

pursuant to mortality tables published in the contract with the particular insurance company. "All of the companies participating in the State Deferred Compensation Plan use sex segregated actuarial tables." *Id.*, at 648. Plaintiff Norris "requested that her monies be invested in Lincoln National Life Insurance Company's fixed annuity contract." *Id.*

If the life annuity had not been provided as part of the Plan, the participants, in order to receive their benefit in the form of a life annuity, would have been required to first bear the tax consequences of receiving their contributions in the form of a lump sum and then purchasing an annuity in the open market. In the open market, not only would participants have been subject to sex-differentiated actuarial tables, but also they would have had fewer dollars with which to buy their annuity due to the intervening tax consequences. Thus, every man and every woman buying an annuity in the open market would receive a lesser monthly annuity than that provided under the Plan.

In view of the foregoing , and particularly the fact that Arizona did not itself use sex-differentiated actuarial tables, it is obvious that Arizona did not have the discriminatory intent which is required to sustain a cause of action for "disparate treatment." In addition, the District Court found that Arizona did not act out of purposeful discrimination. 486 F. Supp. 645 at 651. Based upon plaintiff Norris' failure to prove discriminatory intent, any claim by her grounded upon alleged "disparate treatment" must fail.

Even assuming arguendo that Arizona itself used sex-differentiated actuarial tables, it is obvious that reliance on such tables was not a pretext to mask an intention to disadvantage and harm females. The use of sex-differentiated tables to calculate benefits is merely an accepted actuarial practice. *Peters v. Wayne State University, supra.*

C. NO "DISPARATE IMPACT"

Finally, scrutiny under a "disparate impact" theory of plaintiff Norris' challenge to the use of sex-differentiated actuarial tables in the computation of her retirement benefits demonstrates her claim must fail.

"Disparate impact" occurs when an employer's facially neutral policy burdens one class more than another. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In the instant case, the use of sex-differentiated actuarial tables does not burden one class more than another. As indicated above, no differentiation exists in regard to take-home pay as between males and females such as existed in *Manhart*.

Since this case involves an employee benefit plan, rather than employee wages, the analysis set forth earlier, based upon *General Electric v. Gilbert, supra,* and *Geduldig v. Aiello, supra,* is controlling. The value of the package to each of the sexes must be examined to determine the existence of a discriminatory impact or effect. The principle underlying this determination was enunciated in *Gilbert* where this Court held:

> "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme."

429 U.S. at 138.

It was on this basis the Circuit Court of Appeals for the 6th Circuit in *Peters v. Wayne State University, supra,* held that the retirement benefits package offered by Wayne State University, although based on sex-differentiated actuarial tables, was not worth more to men than to women and, therefore, did not violate Title VII. On this same basis the retirement benefits package offered here by Arizona has no discriminatory impact or effect and, thus, satisfies Title VII.

Even assuming arguendo, the use of sex-differentiated actuarial tables in the computation of retirement benefits resulted in a discriminatory impact upon females (which it

clearly does not for the reasons set forth above), the claim of plaintiff Norris nevertheless could not be sustained. A showing of discriminatory impact merely serves to establish a *prima facie* case. *Griggs v. Duke Power Co., supra,* at 430-432. The burden then shifts to the employer to demonstrate that the practice has a "manifest relationship to the employment in question." *Id.*, at 432.

In the case of *Peters v. Wayne State University, supra,* the Circuit Court of Appeals for the 6th Circuit, in holding that no violation of Title VII occurred as a result of Wayne State's use of sex-differentiated actuarial tables, demonstrated that the use of such tables constitutes a legitimate business practice.

> "Common sense supports this holding. Plaintiffs point out that individual women may not live to the predicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not life to the predicted statistical age but both women and men have the *same probability* of living to the predicted statistical age."

___ F. 2d at ___

The legitimacy of using sex-differentiated actuarial tables in the computation of benefits is also substantiated by the employer's need to avoid the inevitably insidious fiscal consequences of *adverse selection* which would flow from a mandated implementation of unisex tables. Finally, the very fact that Arizona, if it is to provide the annuity option to its plan participants, can only do so by using the actuarial tables available to it in the insurance industry, all of which are sex-differentiated, demonstrates that the use of sex-differentiated actuarial tables is based upon a necessary business practice.

In summary, it is respectfully submitted that the use of sex-differentiated actuarial tables in the computation of retirement benefits is not discriminatory on its face and does not result in either "disparate treatment" or a "disparate impact" in violation of Title VII.

POINT II

TO THE EXTENT TITLE VII PURPORTS TO PRECLUDE A STATE GOVERNMENTAL EMPLOYER FROM PARTICIPATING WITH A THIRD-PARTY INSURER SO AS TO PROVIDE ANNUITY BENEFITS BASED UPON SEX-DIFFERENTIATED ACTUARIAL TABLES, TITLE VII VIOLATES THE TENTH AMENDMENT.

In the case of *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the extension of the minimum wage and maximum hour provisions of the Fair Labor Standards Act to cover employees of States and their political subdivisions violated the Tenth Amendment. In the *National League of Cities* case this Court stated:

> "...the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system,' *Fry*, 421 U.S., at 547 n. 7. This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3."

426 U.S. at 852.

The *National League of Cities* case was predicated upon a challenge to the limits of Congress' authority under the Commerce Clause. The decision noted that it expressed "no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the speinding power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment." *Id.*, at 852, n. 17.

In the instant case, the Circuit Court of Appeals, relying upon the case of *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), held that Arizona's Tenth Amendment argument lacked merit. However, the *Fitzpatrick* case is inapposite since it merely held that the imposition of an award of damages under Title VII against a state government is not violative of the Eleventh Amendment. *Fitzpatrick* did not hold that § 5 of the Fourteenth Amendment authorized Congress to enact legislation superseding the integral operations of state governments, notwithstanding the Tenth Amendment.

Likewise, the *Manhart* decision did not address the issue of whether integral operations of state governments were protected by the Tenth Amendment from purported interference under Title VII. In any event *Manhart* is distinguishable from the instant case in that in *Manhart* the take-home pay of every female was mandated by the plan to be less than that of a similarly situated male. In the instant case Arizona has merely made available an additional voluntary option pursuant to which an employee may receive his contributions and accruals thereon in the form of an annuity. Even assuming Title VII, despite the holding of *National League of Cities*, does preclude the application of sex-differentiated actuarial tables in the context of mandatory contributions, it should not be extended beyond the holding in *Manhart* to preclude a public employer from making available an additional optional form of retirement benefit, particularly where that benefit is provided based upon actuarial tables used by an outside insurer which are standard to the industry. Such an extension of *Manhart* would

unreasonably invade the rights of the states to determine the manner of operation of their integral functions.

In the *Manhart* case this Court emphasized Title VII was not intended "to revolutionize the insurance and pension industries." 435 U.S. at 717. This Court further stated:

> "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market."

Id., at 717-718.

Given that *Manhart* did not preclude an employer from setting aside equal retirement contributions for each employee to purchase the largest benefit available in the open market, it likewise follows that an employer should not be precluded from allowing each employee an additional option to use his or her own contributions to purchase an annuity from an independent insurance company in accordance with the actuarial tables used in the open market. The distinction between that which *Manhart* countenanced and the conduct of Arizona herein sought to be prohibited is without a meaningful distinction.

In summary, Amicus respectfully urges that the *Manhart* decision should not be unnecessarily extended in a fashion which will result not only in artificial distinctions but also will unreasonably erode the Tenth Amendment.

POINT III

THE MANHART DECISION WAS EXPRESSLY LIMITED TO DISCRIMINATORY CONDUCT BY AN "EMPLOYER," AND AS A MATTER OF LAW THERE WAS NO DISCRIMINATION BY AN "EMPLOYER."

The term "employer" for purposes of Title VII is defined in 42 U.S.C. §2000e(b), subject to certain exclusions not herein applicable, as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person ... except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers." The term "employee," as defined in 42 U.S.C. §2000e(f), sheds no additional light on the manner in which the term "employer" is to be construed for purposes of Title VII.

Amicus respectfully submits that the absence of any special language in 42 U.S.C. §2000e in regard to the definition of the term "employer" requires a construction of that term in accordance with its traditional common law definition. The principle of statutory construction is well established that language and terms contained in statutes must be read in accordance with their ordinary meanings absent a showing that Congress used a special definition or otherwise indicated an intent that a special definition be invoked. *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-581 (1975).

In the case of *Hishon v. King & Spaulding*, 678 F. 2d 1022 (11th Cir. 1982), the Court noted that the legislative history surrounding the term "employer" as used in Title VII reveals but a single remark. That one remark, as noted by the Court, was a statement by Senator Clark "that the term employer was 'intended to have a common dictionary meaning except as

expressly qualified by the Act.' 110 Cong. Rec. 7216 (April 8, 1964)." 678 F. 2d at 1027.

And in the case of *Smith v. Dutra Trucking Company*, 410 F. Supp. 513 (N.D. Cal. 1976) aff'd 580 F. 2d 1054 (9th Cir. 1978), the Court concluded:

> "[T]here is nothing in the legislative history of the Act to indicate a Congressional intent to construe the term 'employee' in any manner other than in accordance with common law agency principles. Those are the principles by which plaintiff's assertion that she is an employee must be evaluated."

410 F. Supp. at 516.

In the case of *Spirides v. Reinhardt*, 613 F. 2d 826 (Dist. of Col. Cir. 1979), the Court enunciated the test to be applied for purposes of Title VII:

> "This test calls for application of general principles of the law of agency to undisputed or established facts. Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the 'means and manner' of the worker's performance is the most important factor to review here, as it is at common law and in the context of several other federal statutes. If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist."

613 F. 2d at 831-832 (footnotes omitted).

Based upon the ordinary and traditional meaning of the term "employer," the legislative history surrounding that term, and the judicial test set forth in *Spirides* for determining the existence of an employer-employee relationship for purposes of Title VII, it is apparent that the private insurance companies from whom the plaintiff Norris was able to purchase an annuity were not her employer for purposes of Title VII.

In *Manhart* this Court stated: "Title VII and the Equal Pay Act govern relations between employees and their employers, not between employees and third parties." 435 U.S. at 718, n.33. Pursuant to the foregoing analysis it is clear that the insurance companies involved in the instant case, all of which used sex-differentiated actuarial tables, were "third-parties" rather than plaintiff Norris' "employer."

Although this Court also noted in *Manhart* that an employer could not avoid its responsibilities under Title VII "by delegating discriminatory programs to corporate shells," *Id.*, it is beyond cavil that the said insurance companies were not corporate shells of Arizona.

Finally, this Court also pointed out in *Manhart:* "Title VII applies to 'any agent' of a covered employer, 42 U.S.C. §2000e(b) (1970 ed., Supp. V), and the Equal Pay Act applies to 'any person acting directly or indirectly in the interest of an employer in relation to an employee,' " *Id.*, at 718, n. 33. However, examination of the basis on which annuity benefits, where elected, were provided, demonstrates that the insurance companies providing such benefits were neither the agent of Arizona nor did they act directly or indirectly in the interest of Arizona.

The District Court noted, based upon the facts stipulated to by the parties, that amounts received by persons such as plaintiff Norris were "determined by the use of actuarial tables published by the particular company." 486 F. Supp. at 648. Specifically as to plaintiff Norris, the District Court indicated that on May 3, 1975, she "made application to the Governing Committee to participate under the Plan and requested that her monies be invested in Lincoln National Life Insurance Company's fixed annuity contract." *Id.* The benefit provided to plaintiff Norris, which she indeed selected herself, and, particularly, the computation of that benefit based upon sex-differentiated actuarial tables, was obviously not a consequence of any "control" exercised by Arizona over the Lincoln

National Life Insurance Company, nor was it a consequence of any action taken by the Lincoln National Life Insurance Company "in the interest" of Arizona. The Lincoln National Life Insurance Company, like all of the insurance companies available to Arizona, had long since used sex-differentiated actuarial tables in the computation of benefits. Their use of sex-differentiated actuarial tables was strictly a matter of self-interest, being in no way related to the interests of Arizona. Their use of sex-differentiated actuarial tables was their means of risk classification which would fund their obligations in an actuarially sound fashion which did not invite deficits resulting from large scale adverse selection. Most demonstrative of the fact that Lincoln's use of sex-differentiated actuarial tables was not an action in the interest of Arizona was that Arizona received no savings or other benefit from the use of such tables. Arizona provided the benefit merely to enable plan participants, all of whom were voluntary, to enjoy access to an open market annuity without having to bear the tax consequences of first withdrawing their monies from the plan before purchasing the same annuity in the open market.

In summary, Title VII, in accordance with 42 U.S.C. §2000e-2(a), prohibits discrimination by an employer. Arizona as an "employer" committed no act of discrimination, and, clearly, Lincoln National Life Insurance Company was not the "employer" of plaintiff Norris.

POINT IV

EVEN ASSUMING ARGUENDO ARIZONA'S ANNUITY OPTION DID VIOLATE TITLE VII, NEVERTHELESS THE RELIEF GRANTED BY THE COURTS BELOW WAS CONTRARY TO THE MANHART DECISION.

At the outset it must be emphasized for the reasons set forth by the petitioner in its petition for certiorari, as well as those set forth hereinabove, Arizona's annuity option, which was based upon sex-differentiated actuarial tables, did not violate Title VII. However, even assuming arguendo it did, in any event, it was error for the courts below to order that Arizona supplement the future life annuity payments paid by independent insurance companies to female employees in order to make them equal to those paid to similarly situated male employees. The granting of such relief was contrary to the holding of this Court in *Manhart*.

In denying retroactive relief in *Manhart* this Court indicated, "Retroactive liability could be devastating for a pension fund." 435 U.S. at 722. In addition, this Court stated:

> "These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. *Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation.* The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result."

Id., at 721 (emphasis added).

In the instant case, plaintiff Norris enrolled in the deferred compensation plan in 1975. A requirement that Arizona

increase her future annuity payments with regard to contributions made prior to the 1978 decision in *Manhart* obviously would have a retroactive effect in contravention of *Manhart*. As this Court noted, "pension administrators could reasonably have thought it unfair — or even illegal — to make male employees shoulder more than their 'actuarial share' of the pension burden." *Id.*, at 720. And with regard to the issue of unequal benefits, as contradistinguished from unequal contributions, pension administrators, at the very least, certainly remain justified in relying upon sex-differentiated actuarial tables based upon the existing split of authority in the United States Circuit Court of Appeals. [See *Peters v. Wayne State University, supra;* cf. *EEOC v. Colby College*, 589 F. 2d 1139 (1st Cir. 1978)].

In *Manhart* this Court specifically denied a backpay award, 435 U.S. at 723, i.e., a refund of excess contributions made by women to the Los Angeles Department of Water and Power plan prior to the *Manhart* decision. Thus, this Court refused to apply unisex tables to contributions made prior to its decision. The granting of increased future annuity payments to plaintiff Norris, based upon her contributions back to 1975, had the effect of applying unisex tables to contributions made prior to *Manhart* and constitutes a backpay award in violation of the *Manhart* decision.

Not only have the Courts below improperly granted plaintiff Norris a backpay award, but, in addition, the award so granted exceeded that which would have been allowable were a backpay award even appropriate. Arizona was ordered to bring the future annuity payments of females up to the level of their male counterparts. Thus, the award gave females for purposes of annuity payments the benefit of "best tables" or the male tables, not merely unisex tables. This award was contrary to the language of this Court in *Manhart* as follows:

> "Further doubt about the District Court's equitable sensitivity to the impact of a refund order is raised by the

> court's decision to award the full difference between the contributions made by male employees and those made by female employees. This may give the victims of the discrimination more than their due. If an undifferentiated actuarial table had been employed in 1972, women employees would no doubt have been lower than they were, but they would not have been as low as the contributions actually made by men in that period. *The District Court should at least have considered ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan.*"

435 U.S. at 720, n.36 (emphasis added).[3]

In summary, even assuming for purposes of argument Arizona's annuity option did violate Title VII, in any event, it was error not only for the courts below to grant retroactive relief, but, in addition, the error was compounded by basing such retroactive relief upon male actuarial tables.

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[3]Although the magnitude of the total costs of the relief granted in Arizona's case may be relatively small because the plan was only begun in 1975 and the number of participants was not large, the costs to other plans of retroactive liability for use of sex-differentiated actuarial tables in the computation of benefits would be far greater. E.g., in the case of the New York State Teachers' Retirement System the costs on a "best tables" basis has been indicated by the System's actuary to be either $621 million or $689 million depending upon certain other actuarial assumptions. Estimates by the actuaries of the New York State Employees Retirement System, the New York State Policemen's and Firemen's Retirement System, and the New York City public retirement systems indicate combined costs of retroactive liability on a "best tables" basis in excess of $1.6 billion. This Court noted in *Manhart* that retroactive relief should not be granted regardless of the fact that the cost to a particular plan might be small, but rather remedies must be founded on principle. *Manhart* at 722, n. 42.

CONCLUSION

The New York State Teachers' Retirement System, as Amicus Curiae, respectfully submits that the judgment of the United States District Court, District of Arizona, as affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, should be reversed as a matter of law for the reasons hereinabove set forth.

Respectfully submitted,

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